circumstances subsequently require it.[11] It was recently decided that where the decree gave the custody of the children to the mother, a modification of it was proper after she had lived with them for several years in a foreign country, intending to make it her home. *Morrill* v. *Morrill*, 77 Atl. 1 (Conn.). The mother in such a case is in the position of a guardian appointed by the court, over whom it has a continuing jurisdiction.[12] In some cases the exercise of this jurisdiction may be proper even though another court is able to act in the matter. But if another court has taken jurisdiction, it would seem that the first should not interfere; for, owing to the children's absence, it is no longer the best judge of their welfare, and has no power to make its orders effective.[13] Since the father, as natural guardian, can change the legal domicile of his children,[14] it is submitted that if he is given their custody and takes them beyond the jurisdiction of the court granting the divorce, it should have even greater hesitation in interfering than where custody is given to the mother.

ESTATES TAIL IN THE UNITED STATES. — Though the Statute *De Donis* seems out of harmony with American institutions,[1] estates tail were introduced into this country[2] and seem to have been recognized in most jurisdictions[3] till done away with by statute. Fines and recoveries naturally came with the estate.[4] Commonly these methods of barring the entail have been expressly abolished or supplanted by simpler legislative processes,[5] with the probable result that legal estates tail can everywhere easily be barred. On the other hand, it is uncertain whether the tenants of equitable estates tail ever had power to dispose of a fee simple. After fluctuating decisions it was at length established in England that they could do so by such a conveyance as would have been effective had the estate been at law.[6] Since equitable estates tail arose only through analogy to the legal estates, our courts should, it seems, follow this consistent principle, but the only case found in which the point was presented has not done so.[7]

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[11] Campbell *v.* Campbell, *supra;* Harvey *v.* Lane, 66 Me. 536. But see Sullivan *v.* Learned, 49 Ind. 252.

[12] Stanton *v.* Willson, 3 Day (Conn.) 37; Stetson *v.* Stetson, 80 Me. 483. The father is still liable for the support of the children. Pretzinger *v.* Pretzinger, 45 Oh. St. 452. *Contra*, Brow *v.* Brightman, 136 Mass. 187.

[13] See Stuart *v.* Bute, 9 H. L. C. 439, where it was said that although the Scotch and English courts both had jurisdiction, they should act in harmony.

[14] See note 4.

[1] Pierson *v.* Lane, 60 Ia. 60.

[2] 4 KENT'S COMMENTARIES, 14.

[3] The Statute *De Donis* seems never to have been in force in Iowa. Pierson *v.* Lane, *supra.*

[4] Dudley *v.* Sumner, 5 Mass. 438; see Carter *v.* Tyler, 1 Call (Va.) 165, 182.

[5] But a Delaware statute makes it perhaps still possible to employ these old methods. DELAWARE REV. STAT. (1893) 630. The existence of fines and recoveries is doubtful when the only relevant legislation is the abolition of estates tail or the destruction of all forms of action by the enactment of a code of procedure.

[6] North *v.* Champernoon, 2 Ch. Ca. 78; Kirkham *v.* Smith, Ambler 518.

[7] The principal case.

Estates tail have not been favored in this country,[8] and though the law relating to them in England remained practically unchanged by statute until 1834,[9] as early as 1776 Virginia had a statute aimed at their abolition.[10] To-day in most states they have been abolished or easy methods of docking them have been provided.[11] The commonest type of legislation converts what would otherwise be a fee tail into a fee simple.[12] In several jurisdictions a fee simple is created in those coming after the first tenant in tail.[13] Since the necessary result of such statutes is that the first donee has less power to convey than he would have as tenant in tail, they are scarcely an aid to the free disposition of land. In a few states the legislature has made a simple deed sufficient to bar the entail.[14] Many of these acts apply only to persons "seised" of an estate tail,[15] apparently leaving equitable estates unaffected unless the analogy to law is again followed by equity.

The application of such statutes to estates already created has been opposed as impairing vested rights. If common recoveries still existed, a statute which cut down the interest of the first taker to a life estate and thereby destroyed the common-law right to suffer a recovery, would impair a vested property right.[16] But a statute which destroyed the future interests or made them more readily destructible would change merely the mode of breaking the entail and would be constitutional.[17] If a common recovery is impossible, the matter cannot be so easily dismissed. Though the interest of the issue of the tenant in tail is not a vested right,[18] a contingent remainder seems to be in the constitutional sense a vested right.[19] *A fortiori* a reversion or vested remainder comes within the protection of the Fourteenth Amendment. Since there must always be a reversion or a vested remainder in fee simple,[20] these statutes in such a jurisdiction would seem necessarily to impair vested rights. So in Rhode Island, where according to the court equitable estates tail could not be barred by any existing method, a statute which allowed such estates already created to be turned into estates in fee simple was held unconstitutional. *Green* v. *Edwards*, 77 Atl. 188 (R. I.). This results in making

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[8] See Hall *v.* Thayer, 5 Gray (Mass.) 523, 529.

[9] Fines and Recoveries Act, 3 & 4 W. 4. c. 74.

[10] See DEMBITZ, LAND TITLES, 117. At an even earlier date, 1712, *De Donis* ceased to be operative in South Carolina. See GRAY, PERPETUITIES, § 19 n.

[11] See STIMSON, AMER. STAT. LAW, § 1313.

[12] CODE OF ALA. (1907) § 3397. In some of these statutes there is a provision that remainders expectant on the estate tail shall be valid as conditional limitations on a fee simple. 4 CONSOL. LAWS OF N. Y. 4932.

[13] GEN. STAT. OF CONN. (1902) § 4027. There is usually an express provision that the first donee shall take only a life estate. STARR'S ANNOT. STAT. (Ill., 1896) 917.

[14] MASS. REVISED LAWS (1902), 1226. A deed under such a statute is not the exact equivalent of a common recovery. For while a common recovery has been held to let in prior incumbrancers, there is no such incident to this deed. Maslin *v.* Thomas, 8 Gill (Md.) 18.

[15] STARR'S ANNOT. STAT. (Ill., 1896) 917.

[16] See FREUND, POLICE POWER, § 591.

[17] See TIEDEMAN, STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY, 624.

[18] Comstock *v.* Gay, 51 Conn. 45.

[19] See 19 HARV. L. REV. 121.

[20] See GRAY, PERPETUITIES, § 11.

the remainders and reversions practically indestructible. But the land need not remain inalienable; for apparently the tenant in tail might be authorized by statute to convey an interest like a base fee.[21]

THE EFFECT OF LEGITIMATION OF A CHILD ON THE FATHER'S RIGHT TO CURTESY. — By the civil law children born in concubinage were rendered legitimate by the subsequent marriage of their parents.[1] A similar rule exists in the canon law.[2] But from earliest times the common law has been that no act of the parents can render a bastard capable of inheriting.[3] So to-day a child born before its parents marry, though legitimated by the law of its domicile, cannot inherit English land.[4] In most of the United States the more humane doctrine of the civil and canon laws has been, to a greater or less extent, adopted by legislation.[5] The statutes commonly establish legitimacy if there is a marriage between the child's parents and a recognition of the child as his own by the father. Where the acts provide that such children shall be legitimate, without qualification, it has been uniformly held that they are made heritable issue of the same status as children born in wedlock.[6] A recent case arising under a statute of this class [7] raises the question whether the legitimation of a bastard by the marriage of its parents gives the father a right to curtesy in the mother's estate of inheritance. *Bond* v. *Bond*, 16 Va. L. Reg. 411 (Va., Circ. Ct., Pulaski Co.).

The classic statement of the requisites for tenancy by the curtesy is that of Littleton: [8] "In every case where a man taketh a wife seised of such an estate of tenements, etc., as the issue, which he hath by his wife, may by possibility inherit the same tenements of such an estate as the wife hath, as heir to the wife; in this case, after the decease of the wife, he shall have the same tenements by the curtesy of England." This right of the husband has always been a favorite of the common law.[9] It was allowed to defeat the lord's wardship when the feudal law was at its height.[10] It is destroyed neither by the husband's abuse of his wife,[11]

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[21] *Cf.* 4 CONSOL. LAWS OF N. Y. 4932. See GRAY, PERPETUITIES, §§ 35 n., 312.

[1] Inst. 1, 10, 13; 3, 1, 2; Cod. 5, 27, 10; Nov. 12, 4; 78, 3; 89, 8. As to the requirement of the child's consent, see Dig. 1, 6, 11; 1, 7, 5.

[2] It is confined to children born as a result of fornication. Decretal. Gregor. IX, iv, 17, 6, *Tanta est vis matrimonii;* iv, 17, 1, *Conquestus est nobis H.* See MAITLAND, CANON LAW IN ENGLAND, 52–56; 16 HARV. L. REV. 22, 39–42.

[3] See GLANVILL, vii, 13, 15; Stat. Merton, 20 Hen. III, c. 9.

[4] Birtwhistle *v.* Vardill, 7 Cl. & F. 895. See *In re* Goodman's Trusts, 17 Ch. D. 266; *In re* Grey's Trusts, [1892] 3 Ch. 88.

[5] See STIMSON, AM. STAT. LAW, §§ 3151–3155, 6631–6634.

[6] Blythe *v.* Ayres, 96 Cal. 532; Jackson's Adm'rs *v.* Moore, 8 Dana (Ky.) 170; Williams *v.* Williams, 11 Lea (Tenn.) 652; Rice *v.* Efford, 3 Hen. & M. (Va.) 225; Ash *v.* Way's Adm'rs, 2 Grat. (Va.) 203. M'Cormick *v.* Cantrell, 7 Yerg. (Tenn.) 615, is not *contra*, the capacity of the child in that case being determined by a special act of the legislature, which did not expressly "legitimate" him, and which, the court held, had to be construed strictly.

[7] VA. CODE, 1904, § 2553.

[8] LIT. § 52.

[9] See BRITTON, ii, c. 2, § 10; 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 414–417.

[10] See 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 417–420.

[11] *In re* Coyle's Estate, 1 Lanc. L. Rev. (Pa.) 234.